

**PARENTAL CHOICE AND SCHOOL VOUCHERS: A VIABLE FACET
OF TEXAS PUBLIC EDUCATION REFORM?**

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I. INTRODUCTION

*"Next in importance to freedom and justice is popular education, without which neither freedom nor justice can be permanently maintained."*¹

—President James A. Garfield

The words uttered by President James A. Garfield are as true today as they were when first spoken on July 12, 1881. Education is crucial to maintaining the basic freedoms upon which the United States of America is built. The United States Supreme Court has determined that "education is perhaps the most important function of state and local governments."² Accordingly, the State of Texas has a constitutional duty to provide for public education.³ However, the Texas Constitution is ambiguous as to how the state shall provide, or more importantly, how to fund public education.⁴ To accomplish this, the state has provided for public education through a number of methods, but has relied heavily upon locally collected ad valorem property taxes.⁵

This current system for funding Texas public education has been continually attacked since the mid 1980's.⁶ These challenges were based on alleged unconstitutionality of the public school funding program utilized in Texas.⁷ On four separate occasions the Texas Supreme Court has held

1. The Quotations Page, <http://www.quotationspage.com/quote/2026.html> (last visited Feb. 2, 2007).

2. See *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954) (noting the importance of education in this country).

3. See TEX. CONST. art. VII, § 1 ("A general diffusion of knowledge being essential to the preservation of the liberties and rights of the people, it shall be the duty of the Legislature of the State to establish and make suitable provision for the support and maintenance of an efficient system of public free schools.").

4. See *id.*

5. See generally *Neeley v. West Orange-Cove Consol. Indep. Sch. Dist. (Neeley)*, 176 S.W.3d 746, 754 (Tex. 2005) (holding that the manner in which Texas funds its public education violates Article VIII, Section 1-e of the Texas Constitution, which prohibits a state-wide ad valorem property tax).

6. See *id.*; see also *Edgewood Indep. Sch. Dist. v. Meno (Edgewood IV)*, 917 S.W.2d 717 (Tex. 1995) (affirming the constitutionality of the Texas public school finance system); *Carrollton-Farmers Branch Indep. Sch. Dist. v. Edgewood Indep. Sch. Dist. (Edgewood III)*, 826 S.W.2d 489 (Tex. 1992) (holding that the financing system was in violation of Article VIII, Section 1-e of the Texas Constitution); *Edgewood Indep. Sch. Dist. v. Kirby (Edgewood II)*, 804 S.W.2d 491 (Tex. 1991) (violation of Article VII, Section 1 of the Texas Constitution); *Edgewood Indep. Sch. Dist. v. Kirby (Edgewood I)*, 777 S.W.2d 391 (Tex. 1989) (violation of Article VII, Section 1 of the Texas Constitution).

7. See *Neeley*, 176 S.W.3d 746; see also *Edgewood IV*, 917 S.W.2d 717; *Edgewood III*, 826 S.W.2d 489; *Edgewood II*, 804 S.W.2d 491; *Edgewood I*, 777 S.W.2d 391.

that the public education financing scheme violates the Texas Constitution.⁸

In November of 2005, the Texas Supreme Court issued its ruling in the most recent attack on the public education finance scheme.⁹ The *Neeley* court was highly critical of the school finance system and ultimately decided that the scheme amounted to an unconstitutional state-levied ad valorem property tax.¹⁰ The *Neeley* decision fulfilled the ominous prediction found in the Supreme Court's earlier decision in *Edgewood IV*, namely that the "local ad valorem taxes have become a state property tax . . . as we warned ten years ago they inevitably would . . ." ¹¹ Such a statewide ad valorem property tax is prohibited by the Texas Constitution.¹² This decision put the Texas Legislature in a difficult position because the Court established a June 1, 2006 deadline by which to solve the funding crisis.¹³

Accordingly, Governor Rick Perry issued a proclamation on April 17, 2006, calling for a special session of the Legislature to address the school funding crisis.¹⁴ This proclamation asked the legislature "[t]o consider legislation that provides for [1] school district property tax relief . . . [2] modification of the franchise tax . . . [3] modification of the motor vehicle sales and use tax . . . [and] [4] modification of the tax on tobacco products."¹⁵ The special legislative session provided some changes to certain taxing schemes, mainly the modifications which the governor requested in his proclamation.¹⁶ Most of these changes concern increases of ciga-

8. *Neeley*, 176 S.W.3d 746; *Edgewood IV*, 917 S.W.2d 717; *Edgewood III*, 826 S.W.2d 489; *Edgewood I*, 777 S.W.2d 391.

9. *Neeley*, 176 S.W.3d 746.

10. *Id.* at 797 (criticizing the Texas public education finance system for being an unconstitutional statewide ad valorem property tax).

11. *Id.* at 754 (realizing that an earlier prediction by the Texas Supreme Court—that the manner in which the State finances public education will again become unconstitutional—has been fulfilled).

12. TEX. CONST. art. VIII, § 1-e ("No State ad valorem taxes shall be levied upon any property within this State.").

13. *See Neeley*, 176 S.W.3d at 799 (establishing a June 1, 2006 deadline by which to remedy the state constitutional problems with the Texas education finance mechanism).

14. Governor Rick Perry, Proclamation by the Governor of the State of Texas (April 17, 2006), available at <http://www.governor.state.tx.us/divisions/press/proclamations/proclamation.2006-04-17>.

15. *Id.*

16. *See* Tex. H.B. 2, 79th Leg., 3d C.S. (2006) (changing allocation of certain sources of tax revenue in an effort to alleviate school district property taxes and fund education); *see also* Tex. H.B. 1, 79th Leg., 3d C.S. (2006); Tex. H.B. 3, 79th Leg., 3d C.S. (2006); Tex. H.B. 4, 79th Leg., 3d C.S. (2006); Tex. H.B. 5, 79th Leg., 3d C.S. (2006).

rette taxes, modification of vehicle sales and use taxes, and increases of franchise taxes.¹⁷

The *Neeley* ruling, the special legislative session, and upcoming elections have created a vacuum into which many groups and advocates have proposed various solutions to the public education finance problem. This combination forced the citizens of Texas to once again try to solve the never-ending riddle that is public education finance. The multitude of opinions, studies, and "solutions" are no doubt confusing to the populace, and advocates for all sides will be trying to persuade the people that their position is the best the State's future. For example, Governor Perry has been successful in persuading the Legislature to change franchise taxes, cigarette taxes, and vehicle sales and use taxes.¹⁸ However, most of these proposed "solutions" to the funding crisis have drawbacks. It seems hypocritical that the government would tax cigarettes at a higher rate in order to help fund children's education, while advocating strongly against any, especially children's, consumption of cigarettes. Also, it seems counterproductive to divert money from other government programs in order to fund education. The available funding should be viewed as a finite amount, a type of zero-sum game, and any additional amount granted to one program results in an equal reduction in funding for another. Utilizing a funding scheme such as this is analogous to removing a plug from one leak, and placing it in another hole, only to have the previous hole drain the resources. This leaves additional taxation as the only remedy, but it seems counterintuitive to declare that it is necessary to educate our youth so that they may be productive and provide the labor for Texas's economic future, yet impose inhibitive taxes on businesses and citizens in order to fund that education. Even private citizens, with their own religious and political agendas, have attempted to influence the future of Texas public education through massive financial support of political candidates.¹⁹

What must not be lost in all of the debate about how to fund public education is the fact that over four million Texas schoolchildren are depending on the citizens, through their elected representatives, to provide for a sufficient, adequate, and constitutional education financing scheme.²⁰ School vouchers, a topic which has garnered much debate, have been suggested as a means through which parents would be given a

17. *See id.*

18. *See id.*

19. *See Voucher Obsession; Having Failed to Win Legislative Support for School Vouchers, Millionaire Pitches Low-income Texans*, HOUSTON CHRONICLE, Aug. 16, 2006, at B8.

20. *See generally* Texas Education Agency, Snapshot 2004: State Totals, <http://www.tea.state.tx.us/perfreport/snapshot/2004/state.html> (last visited Feb. 4, 2007).

choice in deciding their children's education.²¹ School vouchers are not a new concept, attracting national attention in 1955 with Nobel Prize winning economist Milton Friedman's article entitled *The Role of Government in Education*.²² Friedman advocates that the right of parents to choose their children's schools stimulates free market competition, creating a more efficient school system.²³ Friedman also concludes that allowing school choice serves to reduce the homogenization of schools, thereby creating more diversity.²⁴ Under Friedman's theories, the true role of the government should "be limited to assuring that the schools [meet] certain minimum standards" ²⁵ and continue in the traditional role of funding and subsidizing public education.²⁶ Although school vouchers in Milton Friedman's economics-based world may seem idealistic, the utilization of school vouchers should be seriously considered in the Texas education finance reform debate.

The purpose of this comment is to educate its readers about the feasibility of school vouchers as a part of education reform in Texas. It is undeniable that education is an issue which affects all socio-economic classes. Part II focuses on three popular "solutions" to the education funding quagmire, and how school vouchers should be a facet of an overall revision of the Texas public education financing scheme. Part III first discusses the Texas legislative response to the most recent ruling on the

21. See generally Gary Scharrer, *Education—The Elephant in the Room*, HOUSTON CHRONICLE, Sept. 3, 2006, at B1.

22. See generally History of School Choice – Alliance for School Choice, http://www.allianceforschoolchoice.org/school_choice_history.aspx (last visited Feb. 4, 2007). "While the school choice movement can trace its lineage to the very genesis of the United States civil Society, the concept of parental choice in education began to more fully mature through the work of Nobel Prize winning economist Milton Friedman." *Id.*

23. See Milton Friedman, *The Role of Government in Education* 6 (Robert A. Solo ed., Rutgers University Press 1955), available at <http://www.freepublic.com/focus/f-news/1173402/posts> (detailing an economic perspective of education and parental choice).

If capital were as readily available for investment in human beings as for investment in physical assets, whether through the market or through direct investment by the individuals concerned or their parents or benefactors, the rate of return on capital would tend to be roughly equal in the two fields: if it were higher on non-human capital, parents would have an incentive to buy such capital for their children instead of investing a corresponding sum in vocational training, and conversely. *Id.*

24. See *id.* (detailing an economic perspective of education and parental choice).

The adoption of such arrangements would make for more effective competition among various types of schools and for a more efficient utilization of their resources. It would eliminate the pressure of direct government assistance to private colleges and universities and thus preserve their full independence and diversity at the same that it enabled them to grow relatively to State institutions. *Id.*

25. *Id.*

26. See generally *id.*

(un)constitutionality of public education finance by the Texas Supreme Court. The next portion of Part III focuses on the typical Establishment Clause challenges which arise from school voucher and parental choice programs, and how the United States Supreme Court has ruled in recent decisions concerning separation of church and state, as well as the Court's decisions in cases involving family autonomy. The last portion of Part III briefly discusses the role of personal choice and free-market capitalism in American society. Part IV briefly evaluates some of the statistics and data which indicate support for school voucher and parental choice programs. Lastly, Part V concludes this paper by reiterating that school voucher and parental choice programs grant parents their rights of parental autonomy while maintaining a culturally diverse learning atmosphere for their children.

II. LEGAL BACKGROUND

A. *The Development of State Constitutional Challenges to Education Finance Inequality*

In 1973, the United States Supreme Court made a landmark decision that held that education is not a fundamental right, and that classifications based upon wealth are not subject to strict scrutiny analysis.²⁷ *San Antonio Independent School District v. Rodriguez* established that any governmental interference with education is subject to a rational basis review, and such interference will be upheld when the contested state law "rationally furthers a legitimate state purpose or interest."²⁸ *Rodriguez* foreclosed most, if not all, Equal Protection challenges to the constitutionality of school finance systems such as those used in Texas.

While *Rodriguez* was being decided, the New Jersey Supreme Court heard a similar case, and ruled that the New Jersey public school system violated the New Jersey state constitution.²⁹ This decision gave those seeking to challenge public school finance programs a new avenue through which to pursue their agenda.

27. See *San Antonio Ind. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 18 (1973) (ruling that education is not a fundamental right and does not deserve the protection of strict scrutiny analysis).

28. *Id.* (citing *McGinnis v. Royster*, 410 U.S. 263, 270 (1973)) (deciding that education is not a fundamental right by announcing that "[t]he constitutional standard under the Equal Protection Clause is whether the challenged state action rationally furthers a legitimate state purpose or interest").

29. See *Robinson v. Cahill*, 303 A.2d 273 (N.J. 1973) (ruling that the New Jersey public school system violated that state's constitution).

Subsequently, those seeking to protest state school finance schemes turned to state constitutional challenges.³⁰ It appears that no state is immune to such challenges.³¹ As of 1999, several state public school finance programs have been found unconstitutional in some manner.³² Yet, during that same time period, about the same number have been upheld.³³

B. *The Edgewood Cases and the Texas Legislative Response*

Particularly in Texas, a set of cases has continually challenged the constitutionality of the public school finance mechanism.³⁴ The *Edgewood* cases represent major attempts to overhaul the method that Texas utilizes to finance public education.

1. *Edgewood I*

In 1987, the Mexican American Legal Defense and Education Fund (MALDEF) represented Edgewood Independent School District (I.S.D.) in Travis County District Court. Edgewood I.S.D. sought a declaration by the court that the school finance scheme violated the Texas Constitu-

30. Alexandra Natapoff, 1993: *The Year of Living Dangerously: State Courts Expand the Right to Education*, 92 EDUC. L. REP. 755, 760 (1994) (describing the most recently used method of attacking public education finance programs).

31. See J. Steven Farr & Mark Trachtenberg, *The Edgewood Drama: An Epic Quest for Education Equity*, 17 YALE L. & POL'Y REV. 607, 609 (1999) (noting that a majority of the States have faced challenges to their public education funding methods and programs).

32. See *id.* at 609; see, e.g., *Serrano v. Priest*, 557 P.2d 929 Cal.(1976) (ruling that the California public school financing system was invalid under the California equal protection provisions); *Rose v. Council for Better Educ.*, 790 S.W.2d 186 (Ky. 1989) (declaring that the Kentucky school finance system was unconstitutional because State had not met its state constitutional mandate to enact legislation providing for an efficient system of public schools throughout the state); *McDuffy v. Sec'y of Educ.*, 615 N.E.2d 516 Mass. (1993) (ruling that Massachusetts was not currently fulfilling its State constitutional duty to provide education in the public schools for children); *Seattle Sch. Dist. No. 1 v. State*, 585 P.2d 71 Wash. (1978) (holding that the use of special excess tax to fund education violated the Washington state constitution).

33. See J. Steven Farr & Mark Trachtenberg, *The Edgewood Drama: An Epic Quest for Education Equity*, 17 YALE L. & POL'Y REV. 607, 610 (1999); see, e.g., *Shofstall v. Hollins*, 515 P.2d 590 (Ariz. 1973) (ruling that the school financing system met the educational mandates of the Arizona Constitution); *Exira Sch. Dist. v. Iowa*, 512 N.W.2d 787 (Iowa 1994) (upholding the constitutionality of the Iowa public education financing mechanism); *Gould v. Orr*, 506 N.W.2d 349 (Neb. 1993) (upholding the constitutionality of the Nebraska public education financing system); *Fair Sch. Fin. Council v. Oklahoma*, 746 P.2d 1135 (Okla. 1987) (ruling that the Oklahoma manner of financing public education did not violate the State constitution).

34. See generally *Edgewood IV*, 917 S.W.2d 717 (affirming the constitutionality of the Texas public school finance system); *Edgewood III*, 826 S.W.2d 489; *Edgewood II*, 804 S.W.2d 491; *Edgewood I*, 777 S.W.2d 391.

tion by failing to provide an efficient public school system.³⁵ Following appeals, the Texas Supreme Court ruled in a unanimous decision that the public education finance system did violate the Texas Constitution because the legislature failed to "make suitable provision for the support and maintenance of an efficient system of public free school."³⁶ However, the Texas Supreme Court declined to give the legislature any guidance as to how to provide for an efficient public school system.³⁷ This deference to the legislature, although seemingly proper from a separation of powers standpoint, served to perpetuate the Texas school finance crisis.

The Texas legislature responded to *Edgewood I* in a special legislative session called in the Fall of 1989.³⁸ Beginning in February of 1990, the session lasted four months.³⁹ The legislature was unable to devise a suitable finance reform measure by the court-mandated May 1, 1990 deadline.⁴⁰ After reaching a compromise which involved raising sales tax by one-half cent, Governor Clements vetoed the bill, forcing the legislature to scramble and attempt to reach another resolution.⁴¹ After further debate, the Texas legislature enacted Senate Bill 1 in June 1990, with the hope of creating "substantial" fiscal neutrality.⁴² Little did the legislature know that another battle over public school finance was on the horizon.

2. *Edgewood II*

Less than a year and a half after passage of Senate Bill 1, the Texas Supreme Court had the opportunity to decide another *Edgewood* I.S.D. case.⁴³ Upon direct appeal, the Texas Supreme Court decided in *Edgewood II* that "Senate Bill 1 leaves essentially intact the same funding

35. See J. Steven Farr & Mark Trachtenberg, *The Edgewood Drama: An Epic Quest for Education Equity*, 17 YALE L. & POL'Y REV. 607, 630 (1999) (describing the tactics utilized in *Edgewood I*).

36. *Edgewood I*, 777 S.W.2d at 393 (ruling that the Texas public education finance system violated the State constitution).

37. See *id.* at 399 (declining to offer guidance to the Texas legislature as to solving the education finance problem).

38. See J. Steven Farr & Mark Trachtenberg, *The Edgewood Drama: An Epic Quest for Education Equity*, 17 YALE L. & POL'Y REV. 607, 638 (1999) (detailing the legislative response to *Edgewood I*).

39. See *id.* at 646 n.207 (noting the length of the special session).

40. See *id.* at 646 (describing the failure of the legislature to meet the Texas Supreme Court deadline).

41. See *id.* at 647 (detailing the chain of events in the aftermath of *Edgewood I*).

42. See *id.* at 649 (describing the legislative response to Governor Clement's veto).

43. See J. Steven Farr & Mark Trachtenberg, *The Edgewood Drama: An Epic Quest for Education Equity*, 17 YALE L. & POL'Y REV. 607, 650 (1999) (noting that the Texas Supreme Court did not have to wait too long before considering the question of the constitutionality of Texas public education financing).

system with the same deficiencies . . . we reviewed in *Edgewood I*.”⁴⁴ The Texas Supreme Court further found that “[t]he fundamental flaw of Senate Bill 1 lies not in any particular provisions but in its overall failure to restructure the [school finance] system.”⁴⁵ The Supreme Court offered some ideas for fixing the school finance system by suggesting consolidation of school districts, the property tax base, or both.⁴⁶ Ominously, the court held that “[t]he [Texas] Constitution does not present a barrier to the general concept of tax base consolidation, and nothing . . . prevents creation of school districts along county or other lines for the purpose of collecting tax revenue and *distributing* it to other school districts within their boundaries.”⁴⁷ Once again, the Texas Legislature found itself without a constitutional public school finance program.

In the wake of *Edgewood II*, there was a flurry of activity across the state in an attempt to create a solution to the continuing problem of public school finance.⁴⁸ The issue again garnered intense political sentiment, as the public and politicians debated the various interpretations of *Edgewood II*.⁴⁹ In fact, Lieutenant Governor Bill Hobby called for the defeat of the Texas Supreme Court’s nine justices in the next elections.⁵⁰

Following *Edgewood II*, the Texas Legislature faced a difficult challenge because the Supreme Court rebuffed the legislative compromise formed after *Edgewood I*, and had narrowed the legislature’s options.⁵¹ The legislature responded with Senate Bill 351, which provided for a consolidation of school district taxing entities called County Education Districts (CEDs).⁵² This allowed for several formerly independent school districts to become a part of a taxing entity, which would in turn distribute tax revenues.⁵³ The redistribution of tax revenue and the CEDs would become the next battleground in the school finance reform court

44. See *Edgewood II*, 804 S.W.2d at 495 (noting that the revised Texas public education finance system was relatively unchanged from that found in *Edgewood I*).

45. See *id.* at 496 (describing the flaw with the Texas public education finance program).

46. See *id.* at 497 (suggesting some ways the legislature could fix the education finance system).

47. See *id.* at 497–98 (discussing possible methods the legislature could use to finance public education) (emphasis added).

48. See J. Steven Farr & Mark Trachtenberg, *The Edgewood Drama: An Epic Quest for Education Equity*, 17 YALE L. & POL’Y REV. 607, 654 (1999) (describing the aftermath of *Edgewood II*).

49. See *id.* (describing the political climate following *Edgewood II*).

50. *Id.*

51. See *id.* at 659 (describing the Texas Supreme Court response to *Edgewood I*).

52. See *id.* at 661 (describing the legislative response to *Edgewood II*).

53. See J. Steven Farr & Mark Trachtenberg, *The Edgewood Drama: An Epic Quest for Education Equity*, 17 YALE L. & POL’Y REV. 607, 661 (1999) (detailing some of the solutions the legislature proposed following *Edgewood II*).

challenges.⁵⁴ In an odd turn of events, the next constitutional challenges would not come from the financially deprived school districts; rather, the challenge would be lodged by comparatively wealthy school districts.

3. *Edgewood III*

Merely two months after Senate Bill 351 became law, a group of some of the wealthier school districts took issue with the bill.⁵⁵ The plaintiffs in *Edgewood III* argued that the CEDs in Senate Bill 351 were unconstitutional because they amounted to a statewide ad valorem property tax, without voter approval of such taxing authority, and the bill "constituted a local or special law."⁵⁶ At the District Court level, Senate Bill 351 was found to be constitutional, and this ruling was quickly appealed.⁵⁷ On appellate review, the Texas Supreme Court again found that the measures taken by the legislature violated the Texas Constitution in two regards.⁵⁸ First, the Texas Supreme Court held that the CEDs created by Senate Bill 351 violated the Texas constitutional prohibition of a statewide ad valorem property tax.⁵⁹ Second, the court held that the legislatively-created CEDs amounted to the imposition of a tax without an election.⁶⁰ Again, the Texas Supreme Court deferred to the legislature, but the court gave the legislature two tax cycles to prepare a solution to the still unconstitutional education finance scheme in Texas.⁶¹

Following *mesne* legislative sessions, the Texas Legislature reacted to the Texas Supreme Court's mandate with the enactment of Senate Bill 7.⁶² Senate Bill 7 was a piecemeal plan which allowed the wealthiest school districts several options.⁶³ Among these was consolidation by

54. See *id.* at 662 (foreshadowing the next challenge to education finance in Texas).

55. See *id.* (describing the challenges to the Texas public education finance system in *Edgewood III*).

56. *Id.* at 662-63; see generally *Edgewood III*, 826 S.W.2d 489; see also TEX. CONST. art. VIII, § 1-e; TEX. CONST. art. VII, § 3 (denoting taxes for schools); TEX. CONST. art. III, § 56 (describing local and special laws); TEX. CONST. art. III, § 64 (describing the method for consolidating governmental offices and functions).

57. J. Steven Farr & Mark Trachtenberg, *The Edgewood Drama: An Epic Quest for Education Equity*, 17 YALE L. & POL'Y REV. 607, 663-64 (1999).

58. See *Edgewood III*, 826 S.W.2d 489.

59. See *id.* at 493 (ruling that CEDs amounted to an unconstitutional statewide ad valorem property tax); see also TEX. CONST. art. VIII, § 1-e.

60. See *Edgewood III*, 826 S.W.2d at 493 (ruling that CEDs amounted to the imposition of a tax without an election); see also TEX. CONST. art. VII, § 3 (denoting taxes for schools).

61. See *Edgewood III*, 826 S.W.2d at 522-23 (detailing the Texas Supreme Court's ruling in *Edgewood III*).

62. J. Steven Farr & Mark Trachtenberg, *The Edgewood Drama: An Epic Quest for Education Equity*, 17 YALE L. & POL'Y REV. 607, 679 (1999).

63. *Id.*

agreement, allowing other districts to annex commercial property for tax purposes, purchase attendance credits, allow non-resident students to pay tuition, or agree to establish small CEDs for tax purposes.⁶⁴ A school district would be subject to electing one of the aforementioned options if its property value per student exceeded \$280,000.⁶⁵ Legislators finally hoped the end of the school finance debate was over, but much to his dismay the quiet was short-lived.

4. *Edgewood IV*

Not even two weeks passed when MALDEF and others asked a district court to reconsider Senate Bill 7.⁶⁶ The plaintiffs argued that Senate Bill 7 failed in three ways.⁶⁷ The plaintiffs asserted that Senate Bill 7 provided “inadequate state funding, a \$600 gap between rich and poor districts at the maximum allowable rate of taxation, and the biennium lag in determining the amount of state aid” was insufficient.⁶⁸ Joining the “poor school district” plaintiffs were wealthier school districts, who lodged similar complaints as were filed in *Edgewood III*, mainly claiming that 1) the taxation scheme in Senate Bill 7 was tantamount to a state-wide ad valorem property tax, 2) use of tax revenue recapture was unconstitutional, and 3) the reliance on property taxes was not “suitable” per the Article VII, Section 1, of the Texas Constitution.⁶⁹ Additionally, a third group of plaintiffs, comprised of students and parents, argued that the current system denied the constitutional right to a “suitable and efficient education.”⁷⁰ This group also sought a voucher system and tuition reimbursement to allow parents choice in regards to their children’s education.⁷¹

Unlike previous rulings, however, the district court held that Senate Bill 7 was constitutional.⁷² Not surprisingly, the various groups appealed the decision directly to the Texas Supreme Court,⁷³ which affirmed the decision and held that the public school finance scheme created by Senate

64. *Id.*

65. *Id.* at 683.

66. *See id.* at 686 (describing the ensuing challenge to Texas public education financing following *Edgewood III*).

67. J. Steven Farr & Mark Trachtenberg, *The Edgewood Drama: An Epic Quest for Education Equity*, 17 YALE L. & POL’Y REV. 607, 686 (1999).

68. *Id.*

69. *Id.* at 688.

70. *Id.*

71. *Id.*

72. J. Steven Farr & Mark Trachtenberg, *The Edgewood Drama: An Epic Quest for Education Equity*, 17 YALE L. & POL’Y REV. 607, 688–89 (1999).

73. *See id.* at 690 (explaining how an appeal to the Texas Supreme was highly anticipated).

Bill 7 passed constitutional muster.⁷⁴ Justice Cornyn, writing for the majority, held that finance system established by Senate Bill 7 met the constitutional requirement of efficiency, and that efficiency “does not require equality of access to revenue at all levels.”⁷⁵ *Edgewood IV* also ruled that the Senate Bill 7 financing scheme was not an abdication of the Legislature’s “duty to make ‘suitable provision[s]’ for the public school system,”⁷⁶ and it also did not amount to a statewide ad valorem property tax.⁷⁷ Despite this victory for the Texas Legislature, Justice Cornyn forewarned that “[o]ur judgment in this case should not be interpreted as a signal that the school finance crisis in Texas has ended.”⁷⁸

C. *The Neely Case and the Texas Legislative Response*

The “calm” lasted approximately ten years before another major challenge to the Texas school finance scheme surfaced.⁷⁹ As was the case in *Edgewood IV*, the plaintiff-intervenors were comprised of various school districts, both rich and poor.⁸⁰ The rich school districts challenged the state’s education financing scheme on the theory that it amounted to a state imposed property tax, which violates Article VII, Section 1-e of the Texas Constitution.⁸¹ The poor school districts, as intervenors, asserted that the financing system was inefficient “because children in property-poor districts do not have substantially equal access to education revenue.”⁸² The *Neeley* court evaluated the constitutionality of the Texas school finance system in the context of the requirements established by the previous court decisions concerning school finance.⁸³ These requirements are that a public education system must be efficient,⁸⁴ adequate,

74. See *Edgewood IV*, 917 S.W.2d at 725 (“We accordingly affirm the constitutionality of the public school finance system enacted in Senate Bill 7.”).

75. See *id.* at 729 (attempting to delineate some of the aspects of “efficiency” as it pertains to the Texas constitutional requirement that the Legislature provide for an efficient public education system).

76. See *id.* at 737 (addressing the “suitability” requirement of the constitutional duty to provide for public education).

77. See *id.* at 738 (holding that the public education finance plan established by Senate Bill 7 was not a statewide tax).

78. See *id.* at 725 (describing the concerns of the Texas Supreme Court regarding the constitutional viability of the public education finance plan established by Senate Bill 7).

79. *Neeley*, 176 S.W.3d 746.

80. See *id.* at 751–52 (describing the diverse group of plaintiff-intervenors).

81. See *id.* at 751 (describing the arguments proposed by the wealthier school districts).

82. See *id.* at 752 (describing the arguments proposed by the poorer school districts).

83. See generally *id.* (comparing the previous challenges to the Texas public education finance system).

84. See *Neeley*, 176 S.W.3d at 752 (enumerating the separate constitutional requirements for the provision of public education).

and suitable.⁸⁵ The Texas Supreme Court held that although the education finance system complied with, at least for the time being, Article VII, Section 1 of the Texas Constitution, it violated Article VII, Section 1-e's prohibition of a statewide property tax.⁸⁶ The court gave the Texas legislature until June 1, 2006 to reconfigure the public education financing scheme so that it complied with the Texas Constitution.⁸⁷

With the court's decision on November 22, 2005, the Legislature had slightly more than 6 months to correct the infirmities of the Texas school financing system. Consequently, Governor Rick Perry announced a special session of the legislature on April 17, 2006.⁸⁸ The legislature responded with House Bill 2, which provided changes to certain taxing schemes, mainly the modifications which the governor requested in his proclamation.⁸⁹ Most of these alterations concerned increases of cigarette taxes, modification of vehicle sales and use taxes, and increases of franchise taxes.⁹⁰ Not surprisingly, Governor Perry signed House Bill 2 into law on May 24, 2006.

The constitutionality of this reformation of the school finance system is as yet unknown. However, it will undoubtedly be challenged as unconstitutional by one or more of the 1,000 plus school districts in Texas. Because of this inevitability, it is time for the Texas legislature to institute an overhaul of the entire public education finance system. As Justice Brister, writing the dissenting opinion in *Neeley*, points out, the majority "does not go far enough."⁹¹ By failing to demand an 'efficient system' as the Texas Constitution requires, or to demand standing and proof as Texas law requires, this case once again focuses on short-term funding rather than long-term solutions."⁹²

85. *Id.* at 753.

86. *See id.* at 754 ("We now hold, as did the district court, that local ad valorem taxes have become a state property tax in violation of [the Texas Constitution] . . . [W]e conclude that those deficiencies [in the public education system] do not amount to a violation of [the Texas Constitution]."); *see also* TEX. CONST. art. VII, § 1; TEX. CONST. art. VIII, § 1-e.

87. *See Neeley*, 176 S.W.3d at 800 (issuing an ultimatum for the Texas legislature to correct the constitutional deficiencies of the public education finance system).

88. *See* Governor Rick Perry, Proclamation by the Governor of the State of Texas (Apr. 17, 2006), available at <http://www.governor.state.tx.us/divisions/press/proclamations/proclamation.2006-04-17>.

89. *See* Tex. H.B. 2, 79th Leg., 3d C.S. (2006) (changing the allocation of certain sources of tax revenue in an effort to alleviate school district property taxes and fund education).

90. *Id.*

91. *Id.*

92. *Neeley*, 176 S.W.3d at 800.

III. LEGAL ANALYSIS

A. *The Lack of Meaningful Direction from the Texas Supreme Court and its Effect on Public Education Finance*

A common element found in *Edgewood I*, *Edgewood II*, *Edgewood III*, and *Neeley* is the Texas Supreme Court's reluctance to provide explicit direction to the legislature when it comes to providing for a constitutional public education finance system.⁹³ This lack of direction has only compounded the debate, and has had an unknown and incalculable effect on millions of children. Generally, judicial separation of powers arguments are based upon the desire to prevent the judicial branch from invading the province of the legislative or executive branches by exercising power in areas for which it lacks such authority.⁹⁴ One aspect of the underlying logic for separation of powers with regard to the judiciary, is that the judicial branch is not empowered to make policy.⁹⁵ The stigma of a judiciary making public policy is evidenced by the federal practice of appointing judges. Theoretically, this approach fuels a strict adherence to separation of powers because these judges are not accountable to the public through elections. However, Texas uses a system of elected judges,

93. See generally *id.* at 780–81 (opining that the judicial branch has the power to determine whether the legislature has acted within its constitutional prescriptions; however, the court refuses to offer guidance as to how to solve the education finance problem); *Edgewood III*, 826 S.W.2d at 523 (“The duty to establish and provide for such a [public education finance] system is committed by the Constitution to the Legislature.”); *Edgewood II*, 804 S.W.2d at 498 (“We do not prescribe the means which the Legislature must employ in fulfilling its duty [to provide for an efficient public education finance system] [However], our duty is plain: we must measure the public school finance system by the standard of efficiency ordained by the people in our Constitution.”); *Edgewood I*, 777 S.W.2d at 397 (“[T]he obligation [to provide for an efficient public education system] is the legislature’s . . .”).

94. See TEX. CONST. art. II, § 1 (“The powers of the Government of the State of Texas shall be divided into three distinct departments, each of which shall be confided to a separate body of magistracy, to wit: Those which are Legislative to one; those which are Executive to another, and those which are Judicial to another; and no person, or collection of persons, being of one of these departments, shall exercise any power properly attached to either of the others, except in the instances herein expressly permitted.”); see also *Texas Ass’n of Business v. Texas Air Control Bd.*, 852 S.W.2d 440, 444 (Tex. 1993) (“One limit on courts’ jurisdiction under both the state and federal constitutions is the separation of powers doctrine.”).

95. See *Republican Party v. White*, 416 F.3d 738, 747 (8th Cir. 2005) (“It is a common notion that while the legislative and executive branches under our system of separated powers make and enforce public policy, it is the unique role of the judicial branch to *interpret*, and be quite apart from making that policy.”).

thus making them accountable to the public.⁹⁶ After nearly a generation of school children have had to suffer, it seems odd that an elected Texas Supreme Court continues to be unwilling to offer any meaningful guidance to the legislature on the creation of a sufficient, adequate, suitable, and constitutional public education finance system. Texas Supreme Court Justices are, after all, elected and beholden to the public, and insistence on separation of powers as a justification for their failure to provide direction to the legislature is weak.

In the absence of judicial direction, the legislature responded to *Neeley* with House Bill 2 in May of 2006.⁹⁷ As will be seen, this misguided legislative reaction does not help solve the illusive goal of a sufficient, adequate, and suitable public education financing system.

1. The Unguided Legislative Response: House Bill 2

Following Governor Perry's call for a special legislative session,⁹⁸ the Texas legislature convened in Austin. This session met for five weeks, and on May 24, 2006, Governor Perry signed House Bill 2 into law. This bill provided for the establishment of the Property Tax Relief Fund (hereinafter the "Fund"), with the objective of

[r]eduction of the . . . average school district maintenance and operations tax rate; and . . . increasing the level of equalization of school district enrichment tax effort to the extent that limits reliance by school districts on local property tax effort and decreases the enrichment tax rates of districts . . . [and] not to increase the disparity in revenue yield between districts of varying property wealth per weighted student.⁹⁹

The language used in the creation of the Fund appears to state the legislature's intention of creating an efficient, adequate, and suitable public education finance system. However, the three methods chosen to finance this Fund have weaknesses and are not a long term solution to the school finance problem. After analyzing the school finance dilemma, the only long term solutions appear to be levying a statewide education tax or

96. See TEX. CONST. art. V, § 2 (c) ("Said Justices shall be elected (three of them each two years) by the qualified voters of the state at a general election; shall hold their offices six years; and shall each receive such compensation as shall be provided by law.").

97. See generally Tex. H.B. 2, 79th Leg., 3d C.S. (2006) (changing the allocation of certain sources of tax revenue in an effort to alleviate school district property taxes and fund education).

98. Governor Rick Perry, Proclamation by the Governor of the State of Texas (Apr. 17, 2006), available at <http://www.governor.state.tx.us/divisions/press/proclamations/proclamation.2006-04-17>.

99. See TEX. GOV'T CODE ANN. § 403.109 (Vernon 2006) (establishing the Property Tax Relief Fund).

increasing the sales tax rate, both of which will require a constitutional amendment.

House Bill 2 first states that the Fund is to be subsidized through changes in the disposition of revenue from the state franchise tax.¹⁰⁰ The new franchise tax is designed to serve as a subsidy to the Fund, whereas its previous use was restricted to providing for the general fund.¹⁰¹ The estimated franchise taxes for the 2006-07 biennial are \$3.788 billion.¹⁰² If the fund requires supplementation from the franchise tax, other funding must be collected to replace any amount that may be withdrawn, thereby necessitating additional taxation. If this additional taxation is to come from taxes on business, the effect on economic development may be disastrous. One of the major reasons for public education is to provide an attractive labor force for such economic development. It would be unwise to discourage establishment of the businesses which would employ the educated workforce the state is attempting to supply through taxation of such businesses.

The second manner in which the Fund is to be maintained is through the use of tax revenue generated from sale, rental, and use of motor vehicles.¹⁰³ Previously, twenty-five percent of this tax money was allocated to public education, with the remainder going to the general fund.¹⁰⁴ The estimated sale, rental, and motor vehicle *tax* for the 2006-07 biennial is \$5.726 billion.¹⁰⁵ Following the amendments added by House Bill 2, the State Comptroller must deposit all of the monies collected under the sale, rental, and use of motor vehicles to the Fund.¹⁰⁶ The same quandary exists because revenue that was previously designated for use by other programs requires a substitute source of funding. The only solutions are to either raise taxes or cut back on other programs. Absent the creation of a statewide education tax or an increase in the sales tax rate, the diversion of tax revenue from the sales, rental, and use of motor vehicles is not a viable long-term resolution of the public school finance problem.

100. See TEX. TAX CODE ANN. § 171.4011 (Vernon 2006) (allocating certain revenue from the franchise tax to the Property Tax Relief Fund).

101. See generally TEX. TAX CODE ANN. § 171.401 (Vernon 2006) (detailing the previous allocation of funds generated by the franchise tax).

102. See Texas Comptroller of Public Accounts, Available Revenue, <http://www.cpa.state.tx.us/taxbud/bre2006/available.html> (last visited Feb. 4, 2007) (denoting the division of tax revenues available to the State).

103. See TEX. TAX CODE ANN. § 152.1222 (Vernon 2006) (allocating certain revenue from the sale, rental, and use of motor vehicles taxes to the Property Tax Relief Fund).

104. See *id.* (detailing the previous allocation of funds generated by the sale, rental, and use of motor vehicles taxes).

105. Texas Comptroller of Public Accounts, Available Revenue, <http://www.cpa.state.tx.us/taxbud/bre2006/available.html> (last visited Feb. 4, 2007).

106. TEX. TAX CODE ANN. § 152.1222 (Vernon 2006).

The final manner in which House Bill 2 attempts to decipher the school finance riddle is through appropriation of *all* proceeds from cigarettes¹⁰⁷ as well as revenue from taxes on tobacco products and cigars.¹⁰⁸ The estimated cigarette and tobacco tax for the 2006-07 biennium is \$1.044 billion.¹⁰⁹ The amendments allow for allocation of every dollar in cigarette and tobacco tax generated through these sections of the tax code.¹¹⁰

The problem of replacing this lost revenue remains. Undoubtedly, this tax revenue is used for other government programs, and any reduction will require additional taxation or abbreviation of State-funded programs. Additionally, tobacco taxation appears to be hypocritical when the State actively discourages tobacco use among children, yet it desires to fund children's education through the taxation of tobacco.

It is apparent that the proposed solutions to school funding inadequately address the constantly increasing challenges facing the strains the public education financing system. Fundamental changes are needed, including some type of statewide education tax or an increase in the sales tax. There are two components of the education finance dilemma. So far, the Legislature has attempted to manipulate the first of these facets: the financing and funding of education. Nonetheless, the second aspect requires attention. This second facet is the type of education options given to the taxpayers who pay for the system and whose children are supposed to be given the benefit of a constitutionally mandated education.¹¹¹

In 1994, a group of parent-plaintiffs urged the Legislature to seriously consider the feasibility of a parental choice or school voucher program in Texas.¹¹² Such a program would allow parents to make a meaningful choice in one of the most important functions a state government *should* provide for its citizens: education.

107. See TEX. TAX CODE ANN. § 154.6035 (Vernon 2006) (allocating certain revenue from cigarette taxes to the Property Tax Relief Fund) (emphasis added).

108. See TEX. TAX CODE ANN. § 155.2415 (Vernon 2006) (allocating certain revenue from tobacco taxes to the Property Tax Relief Fund).

109. See Texas Comptroller of Public Accounts, Available Revenue, <http://www.cpa.state.tx.us/taxbud/bre2006/available.html> (last visited Jan. 31, 2007) (denoting the division of sources of tax revenues available to the State).

110. See TEX. TAX CODE ANN. § 154.6035 (Vernon 2006); TEX. TAX CODE ANN. § 155.2415 (Vernon 2006).

111. See generally TEX. CONST. art. VII, § 1.

112. See J. Steven Farr & Mark Trachtenberg, *The Edgewood Drama: An Epic Quest for Education Equity*, 17 YALE L. & POL'Y REV. 607, 688 (1999) (describing the argument of certain groups in support of school vouchers during *Edgewood IV*).

B. *The Constitutionality of School Choice*

Generally, parental choice and school voucher systems are criticized as unconstitutional government endorsement of religion.¹¹³ The Supreme Court has articulated three tests to be used when deciding whether an action by the government exceeds the limits of separation of church and state.¹¹⁴ A school voucher or parental choice program can easily be tailored to withstand such constitutional challenges.

Another constitutional implication that arises from parental choice and school voucher programs is the fundamental right of family autonomy, and the right of parents to control the upbringing of their children.¹¹⁵ A program involving school choice strengthens this fundamental right.

[T]he fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the state to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for his additional obligations.¹¹⁶

Lastly, the United States is a country built upon freedom of choice. Our capitalist economy is based upon choice. Not surprisingly, the United States Supreme Court desires to further this "culture of choice," especially when it comes to fundamental rights and significant liberty interests. A key factor in many United States Supreme Court decisions

113. See generally *Zelman v. Simmons-Harris (Zelman)*, 536 U.S. 639 (2002) (holding that the State of Ohio's Pilot Project Scholarship Program did not violate the Establishment Clause of the United States Constitution).

114. See *Lemon v. Kurtzman (Lemon)*, 403 U.S. 602, 612-13 (1971) ("Three such tests may be gleaned from our cases. First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion [; and] finally, the statute must not foster 'an excessive government entanglement with religion.'").

115. See, e.g., *Troxel v. Granville (Troxel)*, 530 U.S. 57 (2000) (holding that a Washington State law which afforded rights to grandparent unconstitutionally violated a parent's fundamental right to control the raising of their children); see also *Wisconsin v. Yoder (Yoder)*, 406 U.S. 205 (1972) (holding that parents have a constitutionally protected right to exempt their children from a mandatory school attendance law when such compulsory attendance conflicts with established religious beliefs); *Pierce v. Soc'y of Sisters (Pierce)*, 268 U.S. 510 (1925) (holding that an Oregon state law requiring children to attend public schools was an unconstitutional violation of a parent's right to make decisions concerning the upbringing of their children); *Meyer v. Nebraska (Meyer)*, 262 U.S. 390 (1923) (holding that a Nebraska law which prohibited teaching in any language other than English was an unconstitutional violation of a parent's right to make decisions concerning the upbringing of their children).

116. *Pierce*, 268 U.S. at 535.

appears to be a desire to leave the ultimate decision concerning fundamental rights and significant liberty interests to the individual.¹¹⁷

1. Establishment Clause Challenges

The lofty eminence of separation of church and state is evident in the first sentence of the First Amendment to the United States Constitution. "Congress shall make no law respecting an establishment of religion" ¹¹⁸ Clearly the public, through its elected representatives in Congress, viewed this theory of separation with marked importance.¹¹⁹ Surprisingly, the Establishment Clause has only recently been incorporated into the Fourteenth Amendment as applying to the states.¹²⁰

In order to strike an appropriate balance, the United States Supreme Court has articulated a test (*Lemon* test) to be used when determining whether a government program violates the Establishment Clause.¹²¹ *Lemon* involved a Pennsylvania statute which provided financial support to non-public schools for the teaching of certain secular subjects, and a Rhode Island statute which paid a direct subsidy to teachers in non-public schools.¹²² The United States Supreme Court held that both statutes were unconstitutional.¹²³ The court stated that the Establishment Clause was designed to prevent "sponsorship, financial support, and active involvement of the sovereign in religious activity."¹²⁴ The *Lemon* test is comprised of three parts.¹²⁵ First, the state "statute must have a secular legislative purpose" ¹²⁶ Second, the statute's "primary effect must be one that neither advances nor inhibits religion" ¹²⁷ Lastly, "the stat-

117. See *Zelman*, 536 U.S. 639 (holding that a parent decides whether to spend government-funded tuition subsidy at public, private, sectarian or secular school); see also *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992) (finding that a woman has a right to choose whether to have an abortion before the viability of the fetus).

118. See U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion") (emphasis added).

119. See generally Jesse H. Choper, *A Century of Religious Freedom*, 88 CAL. L. REV. 1709, 1711 (2000) (describing the early attitudes about the intermingling of religion and government which influenced the drafters of the Constitution).

120. See *Cantwell v. Connecticut*, 310 U.S. 296 (1940) (incorporating the First Amendment prohibition against governmental establishment of religion as being applicable to the States through the Fourteenth Amendment).

121. See *Lemon*, 403 U.S. 602 (ruling that certain state government aid to sectarian schools violated the Establishment and Free Exercise Clauses of the First Amendment).

122. See *id.* at 606–10 (describing the two state laws challenged in *Lemon*).

123. *Id.* at 607.

124. *Id.* at 612 (quoting *Walz v. Tax Comm'n*, 397 U.S. 664, 668 (1970)).

125. *Id.* at 612–13 (describing the three-part *Lemon* test).

126. *Lemon*, 403 U.S. at 612 (describing the first part of the *Lemon* test).

127. *Id.* (citing *Bd. of Educ. v. Allen*, 392 U.S. 236, 243 (1968)).

ute must not foster 'an excessive government entanglement with religion.'"¹²⁸

This seemingly simple three-part test was utilized until 1997, when the United States Supreme Court decided the case of *Agostini v. Felton*.¹²⁹ *Agostini* "folded the entanglement inquiry into the primary effect inquiry."¹³⁰ Although *Agostini* is not a drastic departure from prior Establishment Clause analysis, a key feature of the case arises with the United States Supreme Court's analysis of whether programs have the prohibited effect of advancing religion. It is clear that the United States Supreme Court has "drawn a consistent distinction between government programs that provide aid directly to religious schools, and programs of true private choice, in which government aid reaches religious schools only as a result of the *genuine and independent choices of private individuals*."¹³¹ Consequently, the Supreme Court has indicated that a parental choice or school voucher system which does not directly fund sectarian schools, but vests the choice with the parent will most likely comply with the Establishment Clause.

2. Family Autonomy as a Fundamental Right

The argument in favor of parental choice or a school voucher program is further bolstered by the fact that such a system would advance the fundamental right of family autonomy, specifically the right of parents to control the raising of their children. In *Meyer v. Nebraska*, the United States Supreme Court established family autonomy as a fundamental right when it described the basic aspects of liberty:

[W]ithout doubt, [liberty] denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to *acquire useful knowledge*, to marry, establish a home and *bring up children*, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.¹³²

128. *Id.* at 613 (quoting *Walz v. Tax Comm'n*, 397 U.S. 664, 674 (1970)).

129. See generally *Agostini v. Felton*, 521 U.S. 203 (1997) (holding that a federally supported program that provided school instruction to disadvantaged schoolchildren on a neutral basis complied with the Establishment Clause when such a program contained certain safeguards against the intermingling of religion and government).

130. See *Zelman*, 536 U.S. at 668 (O'Connor, J., concurring) ("[W]e [in *Agostini*] folded the entanglement inquiry into the primary effect inquiry.").

131. See *id.* at 649 (2002) (citations omitted) (noting a distinction between different types of government aid to religion) (emphasis added).

132. See *Meyer*, 262 U.S. at 399 (establishing family autonomy as a fundamental right protected by the Constitution) (emphasis added).

Meyer was the first case to establish that such a fundamental right was protected from improper state infringement through application of the Due Process Clause of the Fourteenth Amendment.¹³³ *Meyer* ruled that a Nebraska law forbidding teachers from instructing certain students in any language other than English was an unconstitutional impediment of a parent's fundamental right to control the rearing of their children.¹³⁴ Accordingly, the Supreme Court endorsed a parent's right to decide how their child shall be educated.

The next case affirming parental autonomy as a fundamental right was *Pierce v. Society of Sisters*, decided in 1925.¹³⁵ *Pierce* decided that an Oregon state law requiring attendance at public schools for essentially all children between the age of eight and sixteen "unreasonably interfere[d] with the liberty of parents and guardians to direct the *upbringing and education* of children under their control"¹³⁶ Again, the Supreme Court advanced the right of parental autonomy in the context of education.

After a lull of nearly a half-century, the Supreme Court decided a case which entailed a hybrid of both the Free Exercise Clause of the First Amendment¹³⁷ and the right of parents to control the upbringing of their children.¹³⁸ *Wisconsin v. Yoder* involved a state law mandating school attendance for children until they reached the age of sixteen.¹³⁹ The United States Supreme Court described the position of education in our society and how government interest in providing such education must conform to the United States Constitution and its protections of individual liberties, noting that:

133. See generally U.S. CONST. amend. XIV, § 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. *Id.*

134. See *Meyer*, 262 U.S. 390 (holding that a Nebraska law which prohibited teaching in any language other than English was an unconstitutional violation of a parent's right to make decisions concerning the upbringing of their children).

135. See *Pierce*, 268 U.S. 510 (holding that an Oregon state law requiring children to attend public schools was an unconstitutional violation of a parent's right to make decisions concerning the upbringing of their children).

136. *Id.* at 534-35 (emphasis added).

137. See generally U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or *prohibiting the free exercise thereof* . . .") (emphasis added).

138. See *Yoder*, 406 U.S. 205 (holding that parents have a constitutionally protected right to exempt their children from a mandatory school attendance law when such compulsory attendance conflicts with established religious beliefs).

139. *Id.* at 207 (describing the Wisconsin statute in question).

[A] state's interest in universal education, however highly we rank it, is not totally free from a balancing process when it impinges on fundamental rights and interests, such as those specifically protected by the Free Exercise Clause of the First Amendment, and the traditional interest of parents with respect to the religious upbringing of their children¹⁴⁰

The Supreme Court went further and drove the last proverbial nail into the coffin by reiterating that "[t]he history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now *established beyond debate* as an enduring American tradition."¹⁴¹ Once more, the United States Supreme Court upheld the rights of parents to control the upbringing of their children as well as the right to practice one's religion without government restraint.

More recently, the United States Supreme Court considered the issue of state infringement upon the fundamental right of a parent to control the rearing of their children in *Troxel v. Granville*.¹⁴² *Troxel* involved a Washington law which afforded *anyone* the right to petition the state for child visitation rights.¹⁴³ The Court held that the statute violated the United States Constitution by infringing upon "the interest of parents in the care, custody, and control of their children – [which] is perhaps the oldest of the fundamental liberty interests recognized by this Court."¹⁴⁴ *Troxel* commented on the long tradition of recognizing the fundamental

140. *See id.* at 214 (describing the interplay between a State's interest in providing education and the constitutional protections of individual liberties) (alteration in original).

141. *See id.* at 232 (opining about the long tradition and establishment of the fundamental right of parents to control the rearing of their children) (emphasis added) (alteration in original).

142. *Troxel*, 530 U.S. at 75.

143. *Id.* at 60 (describing the Washington statute in question) (emphasis added).

144. *See id.* at 65 (illustrating that the fundamental right to control the raising of one's children is entrenched in American jurisprudence) (alteration in original); *see also* *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (stating that the Due Process Clause protects the right of parents to control the upbringing and education of their children); *Santosky v. Kramer*, 455 U.S. 745, 753 (1982) ("The fundamental liberty interest of natural parents in the care, custody, and management of their child[ren] does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State."); (alteration in original); *Parham v. J.R.*, 442 U.S. 584, 602 (1979) (describing the Supreme Court's consistency in applying the established concept that parents have control over their children's upbringing); *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978) (recognizing that the parent-child relationship is constitutionally protected); *Yoder*, 406 U.S. at 232 ("The primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition."); *Stanley v. Illinois*, 405 U.S. 645, 651 (1972) (announcing that the right of a parent to control the management of their children carries a presumption that must be accorded deference).

right to control the rearing of one's children.¹⁴⁵ In particular, the United States Supreme Court mentioned that "the 'liberty' specially protected by the Due Process Clause includes the right . . . to direct the *education and upbringing* of one's children."¹⁴⁶ The Supreme Court also reemphasized that there is no doubt "that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children."¹⁴⁷ For the United States Supreme Court to deny a grandparent an opportunity to seek visitation of their own grandchild clearly demonstrates the paramount importance given to the fundamental right to control the raising and upbringing of one's children.

C. *The Role of Personal Choice in American Society*

The United States of America is a country based on free choice of the individual. Three of the biggest tenets of a society are government, religion, and economics. In the United States, all three of these tenets are rooted in choice of the individual as evidenced throughout the United States Constitution.¹⁴⁸ The Constitution provides for popular election of representatives,¹⁴⁹ protection of contractual rights and abilities of individuals,¹⁵⁰ election of the leader of the country,¹⁵¹ use of ratification by the people of amendments to the Constitution,¹⁵² individual religious and po-

145. See *Troxel*, 530 U.S. at 65 (providing a timeline of U.S. Supreme Court cases dating back over 75 years dealing with a parent's right to the care of their children).

146. *Id.* at 66 (citing *Pierce*, 268 U.S. at 534; *Meyer*, 262 U.S. at 400) (describing the liberty interest protected by the Due Process Clause) (emphasis added).

147. See *id.* (stressing that parents have a fundamental right to control the raising of their children is undoubtedly an entrenched facet of American jurisprudence).

148. See generally U.S. CONST. art. I, § 2, cl. 1 ("The House of Representatives shall be composed of Members chosen every second Year by the People of the several States . . ."); U.S. CONST. art. I, § 10, cl. 1 (protecting existing contract rights from government interference); U.S. CONST. art. II, § 1, cl. 2 (concerning the election of the President); U.S. CONST. art. V (describing the utilization of a popular vote to amend the Constitution); U.S. CONST. amend. I (granting religious and political freedom to the people); U.S. CONST. amend. V (affording the people due process of law); U.S. CONST. amend. XV (granting right to vote to all citizens); U.S. CONST. amend. XVII (detailing process of electing Senators).

149. See U.S. CONST. art. I, § 2, cl. 1 (providing for bi-annual elections of the House of Representatives).

150. See U.S. CONST. art. I, § 10, cl. 1 (explaining that the state cannot impede people's contract rights).

151. See U.S. CONST. art. II, § 1, cl. 2 (concerning the election of the President).

152. See U.S. CONST. art. V (describing the utilization of Congress and the State Legislatures to amend the Constitution).

litical freedom,¹⁵³ due process of law,¹⁵⁴ the right to vote,¹⁵⁵ and the election of Senators.¹⁵⁶ The United States Constitution and its drafters clearly desired to protect individual liberties and freedoms through the advancement of free individual choice. In fact, the development of capitalism in this country was furthered by the United States Constitution.¹⁵⁷

Given the fact that the basis for this country's government and political structure centered around personal choice, it should not be shocking to discover that this country's economic system of capitalism is also governed by free choice. The economic outputs of a society are determined by producers and consumers, and their choices. Producers have the liberty to decide how much land, labor, and capital will be utilized for production.¹⁵⁸ Consumers are free to decide what goods and services to purchase, considering factors such as tastes preferences, market size, income, and consumer expectations.¹⁵⁹ It should not be surprising that education can also be subject to such economic considerations.

Demand is defined as "the amount of a resource, good, or service that people are *willing and able* to buy at a series of prices in a given period of time."¹⁶⁰ Because of the slew of cases involving challenges for better education,¹⁶¹ it is overtly evident that the public is more than willing to "purchase" better education. In fact, Supreme Court Justice Clarence Thomas has written that "many blacks and other minorities now support school choice programs because they provide the greatest educational opportunities for their children in struggling communities."¹⁶²

Having satisfied that requirement for demand, it is the ability to purchase such education services that must be realized. If the govern-

153. See U.S. CONST. amend. I (granting religious and political freedom to the people).

154. See U.S. CONST. amend. V (affording the people due process of law).

155. See U.S. CONST. amend. XV (granting right to vote to all citizens).

156. U.S. CONST. amend. XVII.

157. See generally Forrest McDonald, *The Constitution and Hamiltonian Capitalism, in HOW CAPITALISTIC IS THE CONSTITUTION?* 57 (Robert A. Goldwin & William A. Schambra eds., 1982) (describing the connection between the United States Constitution and the furtherance of capitalism).

158. DAVID E. O'CONNOR & CHRISTOPHER FAILLE, *BASIC ECONOMIC PRINCIPLES: A GUIDE FOR STUDENTS* 63-68 (Greenwood Press 2000) (explaining the factors of production).

159. *Id.* at 34-36 (explaining the factors which affect consumer demand).

160. *Id.* at 31 (emphasis added) (defining demand).

161. See *Neeley*, 176 S.W.3d 746; see also *Edgewood IV*, 917 S.W.2d 717; *Edgewood III*, 826 S.W.2d 489; *Edgewood II*, 804 S.W.2d 491; *Edgewood I*, 777 S.W.2d 391 (illustrating violation of Article VII, Section 1 of the Texas Constitution).

162. *Zelman*, 536 U.S. at 682 (Thomas, J., concurring) (discussing the sentiment of minority parents concerning school choice).

ment provided a subsidy, also known as a transfer payment,¹⁶³ to those with lower income, then a larger group of people would be able to decide how and where to educate their children. With this increase in the demand for provision of better education, an increase in supply of education providers would ensue. Once the demand has been met by an adequate supply, suppliers would be in competition with each other. Such competition ensures that an efficient market will emerge¹⁶⁴ forcing education providers to supply quality education, which will in turn create a better future for society. If these education providers fail to provide adequate services, then parents, as consumers, would seek better service from others. In the long-run, these inefficient providers of inferior education services would be driven out of the market. Clearly, where there is a demand for better education, a capitalist society such as ours should not shy away from meeting that demand by allowing individuals the option of choosing how their children should be educated.

These concepts first drew widespread attention when the Nobel Prize Laureate Milton Friedman advocated this economic approach to education.¹⁶⁵ In 1955, Friedman posited that if parents are given the opportunity to obtain a subsidy to send their child to the school of their own choosing, there would be efficiency in the education industry, much the same as in private industry.¹⁶⁶ This economics-based approach to school choice has its merits and it comports with the traditional concept of free individual choice that the United States embraces.

Additionally, the incorporation of the idea of individual choice is not foreign to the United States Supreme Court, as evidenced by its decisions in cases such as *Lawrence v. Texas* and *Boy Scouts of America v. Dale*.¹⁶⁷ In one of its more controversial and publicized decisions, the importance of individual choice was reinforced when the United States Supreme

163. See DAVID E. O'CONNOR & CHRISTOPHER FAILLE, *BASIC ECONOMIC PRINCIPLES: A GUIDE FOR STUDENTS* 176 (Greenwood Press 2000) (defining transfer payments as "payments of money, goods, or services, financed by one group of citizens and distributed to another group of citizens").

164. See generally *id.* at 45 (describing Milton Friedman and Adam Smith's ideas concerning free markets and the advantages of efficiency that develop from such markets).

165. See generally Milton Friedman, *The Role of Government in Education* (Robert A. Solo ed., Rutgers University Press 1955), available at <http://www.freepublic.com/focus/f-news/1173402/posts> (outlining an economic perspective of education and parental choice).

166. See *id.* (detailing an economic perspective of education and parental choice).

167. See, e.g., *Lawrence v. Texas* (*Lawrence*), 539 U.S. 558, 574 (2003) (stipulating that "our laws and tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education"); *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 647 (2000) (reaffirming an individual's "right to [choose to] associate with others in pursuit of a wide variety of political, social, economic, educational, RELIGIOUS, and cultural" reasons).

Court ruled that "the right of personal privacy includes the abortion decision, . . . [and] that the right of privacy, however based, is broad enough to cover the abortion decision" ¹⁶⁸ The discussion of cases where the United States Supreme Court has emphasized and reaffirmed the various liberties which entail individual choice is beyond the scope of this comment. However, it should be abundantly clear that the United States Constitution supports individual choice, both through its explicit mandates and its interpretation by the courts.

The combination of the fundamental right to privacy, including the ability to control the upbringing of one's children,¹⁶⁹ the spirit of free choice by the individual, and the important role that education plays in maintaining the numerous liberties United States citizens enjoy, establish the necessity for serious consideration of parental choice and school voucher programs as a facet of public education systems.

It can be effectively argued that a state legislature which has essentially denied parents, particularly those with lower incomes, of their well-established constitutional right to control the upbringing of their children, has violated the constitutional protection of such a right. Accordingly, the Texas Legislature, by failing to provide a sufficient, efficient and suitable public education, which denies parents any meaningful choice in the upbringing of their children, has not only violated the Texas Constitution,¹⁷⁰ but also the United States Constitution.¹⁷¹ Quite possibly, the federal constitutional challenges to state public education financing deficiencies, presumably foreclosed by *Rodriguez*, may have new life. Nonetheless, Texas should begin to seriously consider the merits of parental choice of schools in order to avoid such federal constitutional challenges and to comply with its constitutionally imposed mandate to provide for a suitable, adequate and efficient system of public schools.

IV. THE SUPPORT FOR PARENTAL CHOICE AND SCHOOL VOUCHERS

Notwithstanding the advancement of the fundamental right of parents to control the upbringing of their children and the idea of free individual choice, other benefits are found in the use of school vouchers and parental choice.

168. See *Roe v. Wade*, 410 U.S. 113, 154-55 (1973) (finding that a woman has a right to privacy, which, under certain circumstances, includes the right to an abortion).

169. See generally *Troxel*, 530 U.S. 57.

170. See generally TEX. CONST. art. VII, § 1 (mandating that the Texas Legislature has the duty "to establish and make suitable provision for the support and maintenance of an efficient system of public free schools").

171. See generally U.S. CONST. amend. XIV, § 1 (prohibiting the State from depriving "any person of life, liberty, or property, without due process of the law . . .").

A. *Parental Choice Benefits Economically Disadvantaged Students, as well as Society at Large*

First, school choice would allow parents more options and a meaningful decision in their children's education. Enabling children to attend other public schools, or private schools, both secular and sectarian, would satisfy a demand by the public for better educational options. Given the strong correlation between economically disadvantaged students and low educational achievement in Texas, this economically disadvantaged group stands to benefit the most from school vouchers and parental choice.¹⁷² Economically disadvantaged students constitute over fifty-five percent of Texas public school children.¹⁷³ Seeing that this class of students comprises a majority of Texas public school children, school vouchers will have an impact on many Texas school children. Aristotle once said that "[p]overty is the parent of revolution and crime."¹⁷⁴ Since education is commonly believed to be the best means to raise people from poverty, it should be an easy decision that the state should do everything within its power to educate all children, especially those who are economically disadvantaged or impoverished. If the state can educate a child, then the likelihood of that child becoming involved in crime diminishes.

If the common sense behind this approach is insufficient to persuade opponents to school vouchers and parental choice, a comparison of the costs of educating a child versus incarcerating an adult may be more persuasive. In the 2004-05 school year, it cost the State of Texas \$9,269 to educate one child.¹⁷⁵ Assuming a child is educated for thirteen years in the Texas public school system,¹⁷⁶ the total cost to educate that child is

172. See generally Texas Education Agency, TAKS, Statewide Performance Results, http://www.tea.state.tx.us/student.assessment/reporting/results/swresults/taks/2006/allgrades_06.pdf (last visited Feb. 4, 2007) (detailing the passage results for various demographics of the Texas Assessment of Knowledge and Skills test). See also Texas Education Agency, Snapshot 2004: Item Definitions, <http://www.tea.state.tx.us/perfreport/snapshot/2004/itemdef.html> (last visited Feb. 4, 2007) ("Economically disadvantaged students are those who are reported as eligible for free or reduced-price meals under the National School Lunch and Child Nutrition Program, or other public assistance.").

173. See Texas Education Agency, Economically Disadvantaged Status Reports, http://www.tea.state.tx.us/cgi/sas/broker?_service=marykay&_program=adhoc.addispatch.sas&major=st&minor=c&endyear=06&format=W&linespg=60&charsln=120&selsumm=ss&key=TYPE+HERE (last visited Feb. 4, 2007) (detailing the proportion of Texas public school students considered economically disadvantaged).

174. See The Quotations Page, <http://www.quotationspage.com/quote/28911.html> (last visited Feb. 5, 2007).

175. Texas Education Agency, Actual Financial Data, <http://www.tea.state.tx.us/tea/actfinmultiyear.html> (last visited Feb. 4, 2007) (displaying the total expenditures per child for various school years).

176. It takes thirteen years for a child to complete Kindergarten through twelfth grade.

\$120,497.¹⁷⁷ The benefit to society will be that child's increased productivity and opportunity because he obtained an education. On the opposite extreme, if the child does not get a quality education, and lives in poverty, his likelihood of being involved in crime increases. During fiscal year 2005, the Texas Department of Criminal Justice oversaw the incarceration of 658,382 inmates,¹⁷⁸ and spent \$1,922,650,560 to care for these inmates.¹⁷⁹ This gives an average cost of \$2,920 per inmate for fiscal year 2005.¹⁸⁰ The average sentence length for a Texas inmate was 19.6 years during this time period.¹⁸¹ In total, for the incarceration of the average inmate, the state of Texas spends \$57,232.¹⁸² Although the cost of incarcerating the average inmate is slightly less than half of the cost to educate a child, there are many intangible social costs which are not considered. A hypothetical would be beneficial to explain the true picture.

Suppose that on the same day, a student begins kindergarten in a Texas public school and a felon begins a 19.6 year sentence in a Texas prison. After thirteen years, it will have cost the State of Texas \$120,497 to educate the student. It would have cost the State \$37,960 to incarcerate the inmate. However, the State has to pay for over six years' of incarceration for the inmate, whereas the student, assuming he enters the workforce after graduating high school, begins earning income. At the end of 19.6 years, it will have cost Texas \$57,232 to incarcerate the inmate. However, assuming the student earns the per capita income in Texas of \$30,732,¹⁸³ the net *benefit* of educating the student becomes \$82,334.¹⁸⁴ Although

177. This amount is calculated by multiplying the average annual expenditure amount of \$9,269 by thirteen.

178. TEXAS DEPARTMENT OF CRIMINAL JUSTICE, FISCAL YEAR 2005 OPERATING BUDGET 1, available at http://www.tdcj.state.tx.us/publications/executive/FY2005_Statistical_Report.pdf (last visited Feb. 4, 2007) (giving an overview of the Texas prison system during Fiscal Year 2005).

179. See *id.* (detailing the operating budget for the Texas prison system during Fiscal Year 2005).

180. This amount is calculated by dividing the total cost of incarceration by the number of inmates incarcerated.

181. TEXAS DEPARTMENT OF CRIMINAL JUSTICE, FISCAL YEAR 2005 OPERATING BUDGET 1, available at http://www.tdcj.state.tx.us/publications/executive/FY2005_Statistical_Report.pdf (last visited Feb. 4, 2007).

182. This amount is calculated by multiplying the average number of years of an inmate's sentence times the average cost per year to incarcerate.

183. See Bureau of Economic Analysis, United States Per Capita Income 2004, <http://bea.gov/bea/regional/reis/scb.cfm> (last visited Feb. 5, 2007) (Follow these additional steps to obtain Texas' per capita income: 1) Under "Step 1. Select a Table," select "CA 1-3"; 2) Under "Step 2," select "3.0 Per capita personal income," then "Texas," then "2004," then "Display").

184. This amount is calculated by subtracting the total derived from multiplying the years that the student works while the inmate remains incarcerated (6.6) times the per

there are other considerations unaccounted for, it should be clear that the net economic benefit of educating a child far outweighs the costs associated with incarceration which is more likely to occur if that child is not educated.

B. *Parental Choice Benefits Minorities*

Another group which stands to benefit from school vouchers and parental choice are the minorities which comprise a majority of the economically disadvantaged students in Texas. Currently, twenty-three percent of Texas' African-Americans, twenty-six percent of Texas' Hispanics, and twelve percent of Texas' Asians are in poverty.¹⁸⁵ One author has written that "the appeal of private schools is especially strong among parents who are low in income, minority, and live in low-performing districts: precisely the parents who are the most disadvantaged under the current system [of public education]."¹⁸⁶ In fact, when parents of public school children were asked whether they support or oppose school vouchers, the results were overwhelming.¹⁸⁷ The survey divided the respondents into several subgroups based upon income, education, ethnic background, quality of their current school district, political party identification, religion, performance of their current school district, and desire to send their children to private schools.¹⁸⁸ According to the survey results, all but one subgroup (those with postgraduate education degrees, which still responded forty-nine percent in favor) of parents of public school children supported some form of school vouchers.¹⁸⁹ This unambiguously shows that most parents, regardless of race, religion, and educational background, approve of some form of parental choice or school voucher program. This conforms to this country's attitude towards the autonomy of the individual, especially in the arena of controlling the raising and upbringing of one's children.

capita income in Texas for 2004 from the total cost to educate the student for thirteen years, leaving a net *benefit* in dollar amount.

185. CENTER FOR PUBLIC POLICY PRIORITIES, TEXAS POVERTY 101, http://www.cppp.org/files/8/BRP%20poverty101_Sep%2006.pdf (last visited Feb. 4, 2007) (relating the results of the United States Census Bureau's Current Population Survey 2005 to 2006 Supplements).

186. TERRY M. MOE, SCHOOLS, VOUCHERS, AND THE AMERICAN PUBLIC 164, (Brookings Institution Press 2001) (relating the views of various groups of parents on school choice issues).

187. See *id.* at 214 tbl.7-3 (detailing the results of surveys concerning the views of various groups of parents on school choice issues).

188. *Id.*

189. *Id.*

C. Parental Choice Furthers Diversity in Education

A common argument against the use of school vouchers is that allowing parents to decide where to send their children will create less diverse, homogenous schools.¹⁹⁰ The Supreme Court has made it abundantly clear that diversity in education is important.¹⁹¹ A new wave of segregation in schools would obviously have a negative impact on our children, and would be contrary to the wisdom espoused by the Supreme Court. However, there are scientifically sound studies which indicate that schools participating in voucher and parental choice programs are less segregated than their public school counterparts.¹⁹² In fact, the Forster study indicates that the private schools which participate in the Cleveland school choice program are eighteen percentage "points less segregated than Cleveland public schools[.]" while those schools in the Milwaukee school choice program are thirteen "points less segregated than Milwaukee public schools."¹⁹³ The higher levels of integration provide a rich and diverse learning environment for our children.

Due to the fact that school choice would help the impoverished segment of our society, there is a high level of support for parental choice and school vouchers, and indications that schools involved with voucher systems are more integrated and diverse, it will not be surprising to see the people begin to speak through their elected representatives. Parental choice and school vouchers should be seriously considered as a facet of an efficient, adequate, and sufficient Texas public education system.

190. See Casey Lartigue, *Fly-by-Night Public Schools*, The Cato Institute (May 24, 2002), available at <http://www.cato.org/dailys/05-24-02.html> (enumerating certain arguments in opposition to school voucher programs); see also Zina Vishnevsky, *Education Needed to Thrive; Urban League President Says*, PLAIN DEALER (Cleveland, OH), Mar. 16, 2002, at B4 (relating the thoughts of the President of the Urban League on the issue of equality).

191. See, e.g., *Grutter v. Bollinger (Grutter)*, 539 U.S. 306, 331 (2003) ("The diffusion of knowledge and opportunity through public institutions of higher education must be accessible to all individuals *regardless of race or ethnicity*." (emphasis added)); *Gratz v. Bollinger*, 539 U.S. 244 (2003) (holding that an undergraduate university department's admissions policy violated the Equal Protection Clause of the Fourteenth Amendment because it was not narrowly tailored to meet the compelling government interest of educational diversity).

192. See Greg Forster, *Freedom from Racial Barriers: The Empirical Evidence on Vouchers and Segregation*, School Choice Issues in Depth, Oct. 2006, available at <http://www.friedmanfoundation.org/segregation.pdf> (detailing the results of a scientific study which shows that school vouchers programs provide for more integrated schools).

193. National Center for Policy Analysis, *Voucher Programs Less Segregated than Public Schools*, http://www.ncpa.org/sub/dpd/index.php?page=Article&Article_ID=12330 (last visited Feb. 4, 2007) (summarizing the results of a recent study on integration and segregation levels between schools that participate in voucher programs and their public school counterparts).

V. CONCLUSION

Given the long history of crisis concerning the manner in which Texas attempts to provide and fund public education, it appears that new ideas about education are needed. The time may be right for Texas politicians and leaders to consider school vouchers or some sort of parental choice program as a complimentary part of public education. The concept of school vouchers is not of recent vintage,¹⁹⁴ and has become quite popular in the last few years.¹⁹⁵ Additionally, it has become easy to survive some of the major legal challenges concerning school vouchers. One of these major challenges is that government subsidization of education that allows government funding to be spent at sectarian schools amounts to impermissible establishment of religion.¹⁹⁶ The Supreme Court has clearly stated that school voucher programs, which leave the ultimate decision of where to spend such subsidies to the parent, comply with the United States Constitution.¹⁹⁷

The concept of school vouchers and parental choice also furthers the well-entrenched fundamental right of parental autonomy, which is the parental right to control the raising and upbringing of their children.¹⁹⁸ Al-

194. See generally Milton Friedman, *The Role of Government in Education* (Robert A. Solo ed., Rutgers University Press 1955), available at <http://www.freepublic.com/focus/f-news/1173402/posts>.

195. See generally TERRY M. MOE, *SCHOOLS, VOUCHERS, AND THE AMERICAN PUBLIC* 214 tbl.7-3, (Brookings Institution Press 2001).

196. See generally *Zelman*, 536 U.S. 639 (holding that the State of Ohio's Pilot Project Scholarship Program did not violate the Establishment Clause of the United States Constitution).

197. See generally *id.*

198. See *Troxel*, 530 U.S. at 65 (illustrating that the fundamental right to control the raising of one's children is entrenched in American jurisprudence); see also *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (stating that the Due Process Clause protects the right of parents to control the upbringing and education of their children); *Santosky v. Kramer*, 455 U.S. 745, 753 (1982) (discussing "the fundamental liberty interest of natural parents in the care, custody, and management of their child[ren]"); *Parham v. J.R.*, 442 U.S. 584, 602 (1979) (describing the Supreme Court's consistency in applying the established concept that parents have control over their children's upbringing); *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978) (recognizing that the parent-child relationship is constitutionally protected); *Yoder*, 406 U.S. at 232 (intimating that the "primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition"); *Stanley v. Illinois*, 405 U.S. 645, 651 (1972) (announcing that the right of a parent to control the management of their children carries a presumption that must be accorded deference); *Pierce*, 268 U.S. 510 (holding that an Oregon state law requiring children to attend public schools was an unconstitutional violation of a parent's right to make decisions concerning the upbringing of their children); *Meyer*, 262 U.S. 390 (holding that Nebraska law which prohibited teaching in any language other than English was an unconstitutional violation of a parent's right to make decisions concerning the upbringing of their children).

lowing parents to have control over one of the most important aspects of their children's lives comports with the sanctity of the fundamental right of parental autonomy. Furthering such personal choice also reinforces what has been the focus of many of the foundations of our society. This is the concept of personal choice. Personal choice drives our economic thinking. Capitalism is built upon free choice of the individual and businesses. Personal choice is a cornerstone of the United States Constitution and the ideas which that historic document embodies.¹⁹⁹ Accordingly, the concept of personal choice is found throughout the jurisprudence of this nation.²⁰⁰ The idea of parental choice is not a foreign concept to the ideas and doctrines upon which this country was founded, and through which this country has flourished.

Besides the legal and historical reasons justifying the use of parental choice and school vouchers, there are significant social and empirical reasons that justify their use. Due to the demographics in Texas and the demographics in the public schools, parental choice would assuredly benefit those who need it most, namely the vast population of economically disadvantaged students. Along those same lines, parental choice would benefit many of the minority groups found in Texas. Lastly, studies have shown that parental school choice leads to more diversity in participating schools. The benefits of diversity in education are innumerable and are crucial to society. The Supreme Court expressed this in *Grutter v. Bollinger*:

In order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity. All members of our heterogeneous society must have confidence in the

199. See generally, U.S. CONST. art. I, § 2, cl. 1 ("The House of Representatives shall be composed of Members chosen every second Year by the People of the several States . . ."); U.S. CONST. art. I, § 10, cl. 1 (protecting existing contract rights from government interference); U.S. CONST. art. II, § 1, cl. 2 (concerning the election of the President); U.S. CONST. art. V (describing the utilization of a popular vote to amend the Constitution); U.S. CONST. amend. I (granting religious and political freedom to the people); U.S. CONST. amend. V (affording the people due process of law); U.S. CONST. amend. XV (granting right to vote to all citizens); U.S. CONST. amend. XVII (detailing process of electing Senators).

200. See generally *Lawrence*, 539 U.S. 588 (stipulating that "our laws and tradition afford constitutional protection to personal decisions relating to MARRIAGE, PROCREATION, CONTRACEPTION, family relationships, CHILD REARING, and education"); *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000) (reaffirming an individual's "right to [choose to] ASSOCIATE with others in pursuit of a wide variety of political, social, economic, educational, RELIGIOUS, and cultural" reasons); *Troxel*, 530 U.S. at 65 (illustrating that the fundamental right to control the raising of one's children is entrenched in American jurisprudence).

openness and integrity of the educational institutions that provide this training.²⁰¹

Parental choice furthers this important notion of diversity in education.

Because of the inability of the Texas legislature to compose a constitutional, adequate, and efficient public education funding system, nearly a generation of Texas children has suffered. The impact of an undereducated public is astounding.²⁰² In Texas, nearly 50,000 students drop out of public school every year.²⁰³ These dropouts cost the State of Texas an estimated "\$11.4 billion in lost gross state product (GSP)."²⁰⁴ Again, the numbers add up. It obviously would cost Texas less to educate their children than to lose out on the increased productivity and the social costs of supporting a less-educated society. It is imperative that the state become proactive and attempt to remedy this bleak future. Parental choice and school vouchers would provide the educational choice and opportunities that parents, as well as society, should desire for our children. A parental choice program could be implemented slowly and incrementally in order to test the system. The legislature should be willing to give parental choice a try. Texas has attempted various methods of providing education, so it is not farfetched for the state to consider school vouchers. Proper parental choice is not aimed at destroying the public education system, rather it should work in tandem with the existing public education system. This important and useful tool is available and all we need is organized support by parents, students and politicians. The fate of ourselves and our children will be affected by the decisions made with regards to the future of public education in the State of Texas. Possibly that decision will include parental choice or school vouchers.

201. *Grutter*, 539 U.S. at 332 (describing the importance of diversity in education).

202. See generally Texas Comptroller of Public Accounts, *The Cost of Underpaying Texas Teachers* (2004), <http://www.cpa.state.tx.us/specialrpt/teachersalary04/> (detailing the impact of dropouts upon the future of the Texas economy).

203. *Id.*

204. *Id.*

